

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MEGAN J. C.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

Case No. 21-05232

ORDER REVERSING AND REMANDING DEFENDANT'S DECISION TO DENY BENEFITS

Plaintiff has brought this matter for judicial review of defendant's denial of her application for disability insurance benefits.

The parties have consented to have this matter heard by the undersigned Magistrate Judge. 28 U.S.C. § 636(c); Federal Rule of Civil Procedure 73; Local Rule MJR 13.

I. ISSUES FOR REVIEW

- A. Whether the ALJ Properly Evaluated Medical Opinion Evidence
- B. Whether the ALJ Properly Evaluated Plaintiff's Subjective Testimony
- C. Whether the ALJ Properly Evaluated Lay Witness Testimony
- D. Whether the ALJ's RFC Determination Was Supported by Substantial Evidence

II. BACKGROUND

On February 3, 2015, plaintiff filed a Title II application for a period of disability and disability insurance benefits (DIB), alleging a disability onset date of January 31,

1 2014. Administrative Record (“AR”) 78. Plaintiff last met the insured status requirements
2 of the Social Security Act on December 31, 2019; therefore, the relevant period is the
3 period between Plaintiff’s alleged onset date and her date last insured. AR 934.

4 Plaintiff’s application was denied initially and on reconsideration. AR 77–90.
5 Administrative Law Judge (“ALJ”) Marilyn S. Mauer held a hearing on December 7,
6 2015 (AR 1007) and issued a decision on September 26, 2017 that claimant was not
7 disabled. AR 1004-23. Plaintiff appealed the decision to this Court and the Court
8 ordered on August 29, 2019 that ALJ Mauer’s decision be reversed and remanded. AR
9 1062-73.

10 ALJ Malcom Ross held a new hearing on remand on May 27, 2020 (AR 966–
11 1003) and issued a decision on December 1, 2020 that plaintiff was not disabled
12 between the alleged onset date through the date last insured. AR 930-58.

13 Plaintiff seeks judicial review of the December 1, 2020 decision. Dkt. 12.

14 III. STANDARD OF REVIEW

15 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s
16 denial of Social Security benefits if the ALJ’s findings are based on legal error or not
17 supported by substantial evidence in the record as a whole. *Revels v. Berryhill*, 874
18 F.3d 648, 654 (9th Cir. 2017). Substantial evidence is “such relevant evidence as a
19 reasonable mind might accept as adequate to support a conclusion.” *Biestek v.*
20 *Berryhill*, 139 S. Ct. 1148, 1154 (2019) (internal citations omitted).

21 IV. DISCUSSION

22 In this case, the ALJ found that plaintiff had the following severe medically
23 determinable impairments: fibromyalgia; idiopathic intracranial

1 hypertension with associated headaches; major depressive disorder; generalized
2 anxiety disorder with panic attacks; and alcohol use disorder. AR 936. Based on the
3 limitations stemming from these impairments, the ALJ found that Plaintiff could perform
4 a reduced range of light work. AR 939.

5 Relying on vocational expert (“VE”) testimony, the ALJ found at step four that
6 Plaintiff could not perform her past relevant work, but could perform other light, unskilled
7 jobs at step five of the sequential evaluation; therefore, the ALJ determined at step five
8 that Plaintiff was not disabled. AR 956-57.

9 A. Whether the ALJ Properly Evaluated Medical Opinion Evidence

10 Plaintiff assigns error to the ALJ’s evaluation of the medical opinion evidence of
11 Dr. Eider, Dr. Byus, Dr. Davenport, and Dr. Wingate. Dkt. 12, pp. 2–9.

12 Plaintiff summarizes much of the rest of the medical evidence but fails to make
13 any substantive argument about the ALJ’s evaluation of any other opinions or
14 impairments other than those discussed herein. Dkt. 12, pp. 6–8. The Court will not
15 consider matters that are not “specifically and distinctly” argued in the plaintiff’s
16 opening brief. *Carmickle v. Commissioner, Social Sec. Admin.*, 533 F.3d 1155, 1161 n.
17 2 (9th Cir. 2008) (quoting *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145,
18 1164 (9th Cir. 2003)). The Court thus will only consider the ALJ’s evaluation of the
19 opinions of the four professionals specifically raised.

20 1. Medical Opinion Standard of Review

21 Under current Ninth Circuit precedent, an ALJ must provide “clear and
22 convincing” reasons to reject the uncontradicted opinions of an examining doctor, and
23 “specific and legitimate” reasons to reject the contradicted opinions of an examining
24 doctor. See *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995). When a treating or

1 examining physician's opinion is contradicted, the opinion can be rejected "for specific
 2 and legitimate reasons that are supported by substantial evidence in the record." *Id.*
 3 (citing *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995); *Murray v. Heckler*, 722
 4 F.2d 499, 502 (9th Cir. 1983)).

5 2. Opinion of Dr. Eider

6 Wendy R. Eider, M.D. evaluated plaintiff by performing a focused exam on March
 7 26, 2014. AR 482-85. Dr. Eider opined that plaintiff has fibromyalgia, severe pain in her
 8 lower back hips and legs, associated severe sleep disturbance, fatigue, and difficulty
 9 with concentration and memory. AR 483. She also opined: "Given the severity of
 10 [plaintiff's] symptoms and difficulty with concentration and memory I do not recommend
 11 she reenter the work force." *Id.*

12 The ALJ gave "low weight" to Dr. Eider's opinion, because (1) it was conclusory,
 13 (2) it was inconsistent with the improvements of plaintiff's symptoms, and (3) it was
 14 inconsistent with plaintiff's activities. See AR 949-50.

15 With regards to the ALJ's first reason, the ALJ is not required to accept the
 16 opinion of a treating physician "if that opinion is brief, conclusory, and inadequately
 17 supported by clinical findings." *Ford v. Saul*, 950 F.3d 1141, 1154-55 (9th Cir.
 18 2020); *see also, Young v. Heckler*, 803 F.2d 963, 968 (9th Cir. 1986) (a physician's
 19 opinion may be rejected "if brief and conclusory in form with little in the way of clinical
 20 findings to support [its] conclusion"). However, even where a treating physician's opinion
 21 is brief and conclusory, an ALJ must consider its context in the record—especially the
 22 physician's treatment notes. See *Burrell v. Colvin*, 775 F.3d 1133, 1140 (9th Cir. 2014).
 23 Although the ALJ cannot reject the opinion merely for being expressed as answers to a
 24 check-the-box questionnaire, the ALJ may permissibly reject a report that does not

1 contain any explanation of the basis of their conclusion. *Ford v. Saul*, 950 F.3d 1141,
 2 1155 (9th Cir. 2020) (internal quotations omitted).

3 In this case, Dr. Eider's opinion is not adequately supported by clinical findings.
 4 Dr. Eider completed her assessment of plaintiff's hip and back pain, but does not
 5 explain how clinical findings were connected to her assessment of plaintiff's memory
 6 and concentration problems, nor does she explain the basis for her overall conclusion
 7 that plaintiff not reenter the workforce. AR 482-83. Accordingly, the ALJ had a specific
 8 and legitimate reason to discount Dr. Eider's opinion and did not err in doing so.

9 Having found that the ALJ did not err in finding Dr. Eider's opinion conclusory,
 10 the Court need not address whether the ALJ erred evaluating her opinion on other
 11 grounds. Even if the ALJ committed error on those grounds, those errors would be
 12 harmless because the ALJ has provided a specific and legitimate reason for discounting
 13 Dr. Eider's opinion. See *Carmickle v. Commissioner, Social Sec. Admin.*, 533 F.3d
 14 1155, 1162-1163 (9th Cir. 2008) (inclusion of erroneous reasons is harmless).

15 3. Opinion of Dr. Byus

16 In a February 2015 letter addressed to Social Security Administration, plaintiff's
 17 treating chiropractor, Joseph D. Byus, DC, opined that plaintiff's fibromyalgia has
 18 "steadily" worsened "to the point where now she is no longer able to work." See AR 487.
 19 Dr. Byus further opined that plaintiff is "limited from being able to do a great number of
 20 things throughout the course of any given day, and she usually tries to limit the amount
 21 of activity to only as much as is necessary to accomplish that day (i.e. – housework,
 22 groceries, cooking). . ." AR 487.

23 The ALJ gave "low weight" to Dr. Byus's opinion because (1) plaintiff's
 24 symptoms had improved and stabilized, (2) his opinion was inconsistent with plaintiff's

1 activities, and (3) he had treated plaintiff only three times prior to the date of his opinion
 2 letter. AR 950.

3 Plaintiff filed her application before March 27, 2017. Under the Social Security
 4 regulations applicable to this case, “only ‘acceptable medical sources’ can [provide]
 5 medical opinions [and] only ‘acceptable medical sources’ can be considered treating
 6 sources.” See SSR 06-03p. In addition, there are “other sources” such as nurse
 7 practitioners, therapists, and chiropractors, who are considered other medical sources.
 8 See 20 C.F.R. § 404.1513(d)(1). See also *Turner v. Comm'r of Soc. Sec.*, 613 F.3d
 9 1217, 1223–24 (9th Cir. 2010); SSR 06–3p. Evidence from “other medical sources” may
 10 be discounted if, as with evidence from lay witnesses in general, the ALJ “gives reasons
 11 germane to each [source] for doing so.” *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir.
 12 2012) (citations omitted).

13 With regards to the ALJ’s first reason, Social Security Administration regulations
 14 recommend looking at longitudinal records because the symptoms
 15 of fibromyalgia “wax and wane,” and a person may have “bad days and good
 16 days.” SSR 12-2p at *6. See also *Revels v. Berryhill*, 874 F.3d 648, 663 (9th Cir. 2017).

17 Here, the ALJ found that Dr. Byus’s opinion regarding plaintiff’s inability to
 18 perform much of her daily activities due to fibromyalgia-related symptoms was
 19 inconsistent with the medical record showing that plaintiff’s “condition actually improved
 20 and stabilized on her treatment regimen.” AR 950. The treatment notes cited by the ALJ
 21 show that as a result of her medications, plaintiff’s “everyday aches and pains” became
 22 “better” (See AR 517), that “some migraines stopped” (AR 850), and the frequency of
 23 her headaches had changed from daily to weekly (AR 821). However, the record also

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1 shows that shows plaintiff's headaches continued (AR 517, 829, 846, 1345-4) and that
2 plaintiff often required an increase in the dosage of her medication because symptoms
3 returned (AR 829, 1385 1485).

4 Additionally, much of the evidence the ALJ considered regarding plaintiff's
5 strength were physical examinations showing plaintiff had normal gait and "5/5 motor
6 strength." AR 491, 528, 826, 837, 920, 1347, 1359, 1476, 385, 467, 822, 831, 1359,
7 1478. The Ninth Circuit has cautioned against relying upon normal physical examination
8 findings to discount medical opinions and claimant testimony concerning fibromyalgia,
9 noting that findings of normal muscle strength, tone, and stability, as well as a normal
10 range of motion, are "perfectly consistent" with debilitating fibromyalgia, a condition
11 diagnosed "entirely on the basis of patients' reports of pain and other
12 symptoms." *Revels*, 874 F.3d at 663, 666, citing *Benecke v. Barnhart*, 379 F.3d 587,
13 590 (9th Cir. 2004). Discounting Dr. Byus's opinion because plaintiff's symptoms had
14 improved was not a germane reason.

15 With regards to the ALJ's second reason, "[a] claimant need not be completely
16 incapacitated to receive benefits." *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir.
17 2014) (citing *Smolen v. Chater*, 80 F.3d 1273, n. 7 (9th Cir. 1996)). Here, the ALJ failed
18 to explain how plaintiff's activities of cooking simple meals, performing light household
19 chores, driving, and shopping conflicted with Dr. Byus's opinion, which stated that
20 plaintiff is able perform those activities, but only to a diminished extent. AR 487. See
21 *Popa v. Berryhill*, 872 F.3d 901 (9th Cir. 2017) (ALJ failed to explain how
22 plaintiff's daily activities contradicted the lay testimony – and reasons were therefore not

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1 germane). Discounting Dr. Byus's opinion based on plaintiff's daily activities also was
 2 not a germane reason.

3 With regards to the ALJ's third reason, "how long the source has known and how
 4 frequently the source has seen the individual. . ." is a relevant factor when determining
 5 the weight to be given to an "other medical source" opinion. See SSR 06-03p. Here, the
 6 ALJ discounted Dr. Byus's opinion because he had only treated plaintiff three times. AR
 7 950. While a lay witness seeing a claimant on only a few occasions would be a
 8 germane reason to discredit that witness's testimony, in this case, the record shows that
 9 Dr. Byus had seen plaintiff more than three times – the ALJ's finding is therefore not
 10 supported by the record. AR 368, 370-76. As Dr. Byus was plaintiff's chiropractor for
 11 three years, he would have had an opportunity to gain a longitudinal view of plaintiff's
 12 impairments and his opinion is a medical opinion that ALJ was required to consider
 13 under 20 C.F.R. § 404.1513(e)(2). Therefore, discounting it because of a factual error
 14 was not a germane reason.

15 In discounting Dr. Byus's opinion, the ALJ also relied on the opinion of State
 16 agency consultant Robert E. Vestal, M.D. AR 950. Dr. Vestal evaluated plaintiff on
 17 October 9, 2015 using plaintiff's medical records. AR 100-09. Dr. Vestal opined that
 18 plaintiff "retains the capacity for light work with postural, manipulation and environmental
 19 restrictions." AR 103.

20 An examining physician's opinion is "entitled to greater weight than the opinion of
 21 a nonexamining physician." *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995) (citations
 22 omitted); see also 20 C.F.R. § 404.1527(c)(1)(“Generally, we give more weight to the
 23 opinion of a source who has examined you than to the opinion of a source who has not

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1 examined you"). A non-examining physician's or psychologist's opinion may not
 2 constitute substantial evidence by itself sufficient to justify the rejection of an opinion by
 3 an examining physician or psychologist. *Lester*, 81 F.3d at 831 (citations omitted).
 4 However, "it may constitute substantial evidence when it is consistent with other
 5 independent evidence in the record." *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th
 6 Cir. 2001) (*citing Magallanes, supra*, 881 F.2d at 752). "In order to discount the opinion
 7 of an examining physician in favor of the opinion of a nonexamining medical advisor, the
 8 ALJ must set forth specific, *legitimate* reasons that are supported by substantial
 9 evidence in the record." *Nguyen v. Chater*, 100 F.3d 1462, 1466 (9th Cir. 1996) (*citing*
 10 *Lester*, 81 F.3d at 831). An ALJ must consider all opinions, including those from non-
 11 acceptable medical sources, which may in some cases even outweigh the opinions of
 12 acceptable medical sources. See 20 C.F.R. §§ 404.1527(f), 416.927(f).

13 The ALJ gave "great weight" to the opinion of Dr. Vestal because it is consistent
 14 (1) with the medical evidence and (2) plaintiff's daily activities. AR 952-53.

15 With regards to the ALJ's first reason, as previously discussed, the Ninth Circuit
 16 has cautioned against relying upon normal physical examination findings to discount
 17 medical opinions and claimant testimony concerning fibromyalgia, noting that findings of
 18 normal muscle strength, tone, and stability, as well as a normal range of motion, are
 19 "perfectly consistent" with debilitating fibromyalgia, a condition diagnosed "entirely on
 20 the basis of patients' reports of pain and other symptoms." *Revels*, 874 F.3d at 663,
 21 666. Here, the evidence the ALJ cited consists of physical examinations demonstrating
 22 plaintiff's gait and normal strength. AR 491, 528, 826, 837, 920, 1347, 1359, 1476, 385,
 23 467, 822, 831, 1359, 1478. Further, pursuant to Social Security Regulations, when a
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1 claimant has fibromyalgia, the claimant's "longitudinal record" must be evaluated,
2 considering that fibromyalgia symptoms can "wax and wane." See SSR 12-2p. Plaintiff's
3 overall medical record shows that she consistently experienced fibromyalgia related
4 symptoms, including muscle pain and frequent headaches. AR 440, 450, 456, 458, 460-
5 61, 465, 469, 473-74, 476, 482-83, 516, 524, 531, 541, 549, 553, 557, 562, 560, 1302,
6 1343, 1349, 1358, 1365, 1368-69, 1371, 1373, 1474-75. Because Dr. Vestal's opinion
7 was not consistent with the evidence in the record, the ALJ could not discount Dr.
8 Byus's opinion in favor of Dr. Vestal's on this basis.

9 Neither could the ALJ discount Dr. Byus's opinion in favor of Dr. Vestal's on the
10 basis that Dr. Vestal's opinion was consistent with plaintiff's daily activities, specifically
11 her ability to cook, perform light household chores, drive, and shop. AR 949-50. "[M]any
12 home activities are not easily transferable to what may be the more grueling
13 environment of the workplace, where it might be impossible to periodically rest or take
14 medication." See *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). Here, the ALJ
15 provided no explanation as to how plaintiff's activities would be transferable to a work
16 setting. Further, the record shows that plaintiff's ability to engage in these activities were
17 often limited because of her symptoms. For example, plaintiff often cooked simple or
18 pre-prepared meals that required minimum effort and most of the household chores
19 were completed by her husband. AR 254, 295-96, 490, 495, 1229, 1469.

20 The Court finds that Dr. Vestal's opinion was not consistent with the evidence,
21 and because the ALJ gave no other legitimate, supported reason to discount Dr. Byus's
22 opinion, the ALJ could not solely rely on Dr. Vestal's opinion to discount Dr. Byus's
23 without committing error.

1 4. Opinion of Dr. Davenport

2 W. Daniel Davenport, MD, evaluated plaintiff on May 23, 2015 by reviewing her
 3 records and performing a physical examination. See AR 489–92. Dr. Davenport
 4 diagnosed plaintiff with fibromyalgia, severe with lower back and bilateral hip pain;
 5 anxiety/depression; and memory problems secondary to [fibromyalgia] and chronic
 6 fatigue from records. AR 492. Based on these impairments, Dr. Davenport opined that
 7 plaintiff: has a maximum standing/walking capacity of “at least four hours limited by
 8 fibromyalgia” and maximum sitting capacity of “at least four hours;” needs no assistive
 9 devices; has a maximum lifting/carrying capacity was 20 pounds occasionally, 10
 10 pounds frequently; can frequently do reaching handling, fingering, and feeling, limited by
 11 her ability to sit and stand. *Id.*

12 Plaintiff argues that the ALJ erred by failing to include Dr. Davenport’s opinion
 13 regarding plaintiff’s ability to stand, walk, and sit at a maximum of four hours in plaintiff’s
 14 RFC. Dkt. 12, pp. 5–6.

15 In his decision, the ALJ did not explain what portions of Dr. Davenport’s opinion
 16 were given “great weight” and which limitations were included in plaintiff’s RFC. Instead,
 17 the ALJ simply discussed that it was consistent with (1) evidence showing that plaintiff
 18 ambulated with a normal gait and demonstrated intact neurological functioning of the
 19 extremities, (2) evidence that plaintiff’s fibromyalgia and headache conditions had
 20 improved, and (3) plaintiff’s daily activities, including cooking, performing light
 21 household chores, driving, shopping, and running an online shop. See AR 950-51.

22 The ALJ determined that plaintiff’s RFC, in pertinent part, would be light work,
 23 with the following limitations: “frequently balance, stoop, and climb ramps or stairs. She
 24 could occasionally kneel, crouch, and crawl. She could never climb ladders, ropes, or

1 scaffolds. . . She could perform simple tasks. . . She could perform work where standard
2 work breaks were provided. . . She could have occasional workplace changes." AR 939.
3 Nowhere in plaintiff's RFC does the ALJ expressly contain the limitation imposed by Dr.
4 Davenport regarding plaintiff's ability to stand, walk, and sit for a maximum of four
5 hours.

6 To the extent that an ALJ accepts a physician's opinion, he or she must
7 incorporate the limitations contained in that opinion into the RFC. *See Magallanes v.*
8 *Bowen*, 881 F.2d 747, 756 (9th Cir. 1989). When the RFC is incomplete, the
9 hypothetical question presented to the vocational expert at step five is also incomplete,
10 "and therefore the ALJ's reliance on the vocational expert's answers [is] improper." *Hill*
11 *v. Astrue*, 698 F.3d 1153, 1162 (9th Cir. 2012). As the ALJ did not provide an
12 explanation as to what portions of Dr. Davenport's opinion was given "great weight" nor
13 a reason for why he discounted Dr. Davenport's limitations in plaintiff's RFC, the ALJ
14 erred. *See Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988) ("it is incumbent on
15 the ALJ to provide detailed, reasoned, and legitimate rationales for disregarding the
16 physicians' findings[;]" conclusory reasons do "not achieve the level of specificity"
17 required to justify an ALJ's rejection of an opinion); *Blakes v. Barnhart*, 331 F.3d 565,
18 569 (7th Cir. 2003) ("We require the ALJ to build an accurate and logical bridge from the
19 evidence to her conclusions so that we may afford the claimant meaningful review of the
20 SSA's ultimate findings.").

21 5. Opinion of Dr. Wingate

22 Terilee Wingate, PhD, performed a psychological evaluation of plaintiff on May
23 27, 2015 by reviewing plaintiff's records and a function report completed by plaintiff and
24 administering a mental status examination. *See* AR 493-97. Dr. Wingate diagnosed

1 plaintiff with major depressive disorder, recurrent, moderate; generalized anxiety
2 disorder; and alcohol use disorder, mild to moderate. AR 496. Dr. Wingate opined that
3 plaintiff "is able to understand, remember and learn simple and some complex tasks
4 and that she "has difficulty sustaining attention to tasks throughout a daily or weekly
5 work schedule without interruption from anxiety, depressed mood, fatigue, and pain."
6 AR 497. She further opined that plaintiff "has sufficient judgment to avoid hazards and
7 make work decisions" and that she "can probably work with a supervisor and few
8 coworkers." *Id.*

9 The ALJ gave "partial weight" to Dr. Wingate's opinion, crediting plaintiff's ability
10 to understand, remember, and learn simple and complex tasks consistent with the
11 medical evidence in the record, but discrediting plaintiff's ability to sustain attention to
12 tasks and tolerate stress because it was inconsistent with the medical record showing
13 plaintiff's symptoms had improved and stabilized. AR 951.

14 As discussed previously, Social Security Administration regulations recommend
15 looking at longitudinal records because the symptoms of fibromyalgia "wax and wane,"
16 and a person may have "bad days and good days." SSR 12-2p at *6. See
17 *also Revels*, 874 F.3d at 663. Here, the treatment notes cited by the ALJ showed that
18 plaintiff had some improvements when it came to sleep disturbance (AR 527, 544) or
19 mood management (AR 825), but much of the evidence also continuously shows that
20 plaintiff had decreased memory and concentration (AR 527, 541, 825, 919).

21 The ALJ also gave "partial weight" to Dr. Wingate's opinion because "plaintiff
22 appeared to minimize her daily activities during the evaluation" and the opinion was
23 inconsistent with plaintiff's activities. AR 951.

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1 In its August 2019 remand order, this Court found that the ALJ harmfully erred in
 2 discounting Dr. Wingate's opinion for failing to explain how it was "speculative and
 3 based on Plaintiff's reports" and how it was inconsistent with plaintiff's daily activities AR
 4 1066-71. When an issue has already been decided by the district court in the same
 5 case, the law of the case doctrine generally prohibits the ALJ and the district court from
 6 re-visiting that issue and deciding it differently than it was previously decided by the
 7 district court. See *Stacy v. Colvin*, 825 F.3d 563, 567 (9th Cir. 2016) (district court has
 8 discretion to apply law of the case doctrine in Social Security appeals).

9 Here, the ALJ discounted Dr. Wingate's opinion for the substantially the same
 10 reasons. Accordingly, the law of the case doctrine applies, and the same reasons
 11 cannot serve to discount Dr. Wingate's opinion.

12 B. Whether the ALJ's Properly Evaluated Plaintiff's Subjective Testimony

13 During the hearing, Plaintiff testified that because of her fibromyalgia, she has
 14 difficulty sitting and standing for longer than 15 minutes, and she can only walk four
 15 blocks before her knees, hips, and back start hurting. AR 985. She also testified that her
 16 husband has to do most of household chores. AR 988. Plaintiff stated that her memory
 17 has decreased and that this led to her termination from her paralegal job. AR 976, 989.

18 As to her mental health, plaintiff testified that her depression has affected her "in
 19 an awful way" and that as a result, she would "get sad, and down" and have thoughts of
 20 suicide. AR 987.

21 The ALJ's determinations regarding a claimant's statements about limitations
 22 "must be supported by specific, cogent reasons." *Reddick v. Chater*, 157 F.3d 715, 722
 23 (9th Cir. 1998) (citing *Bunnell v. Sullivan*, 947 F.2d 341, 343, 346-47 (9th Cir. 1991) (en
 24 *banc*)). In evaluating a claimant's allegations of limitations, the ALJ cannot rely on

1 general findings, but “must specifically identify what testimony is credible and what
 2 evidence undermines the claimant's complaints.” *Greger v. Barnhart*, 464 F.3d 968, 972
 3 (9th Cir. 2006) (quoting *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th
 4 Cir. 1999)); *Reddick*, 157 F.3d at 722 (citations omitted); *Smolen v. Chater*, 80 F.3d
 5 1273, 1284 (9th Cir. 1996) (citation omitted).

6 Plaintiff assigns error to the ALJ's finding that plaintiff's subjective testimony was
 7 inconsistent (1) her daily activities, (2) her treatment history, and (3) her own
 8 statements. Dkt. 12, p. 11–15; see AR 947-49.

9 Regarding the ALJ's first reason, an ALJ may discount a claimant's testimony
 10 based on daily activities that either contradict her testimony or that meet the threshold
 11 for transferable work skills. *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007). “Only if the
 12 level of activity were inconsistent with Claimant's claimed limitations would these
 13 activities have any bearing on Claimant's credibility.” *Reddick*, 157 F.3d at 722.
 14 Here, the ALJ pointed out plaintiff's ability to cook, perform household chores, make
 15 crafts and sell them online, and deal with finances. However, the record shows that
 16 plaintiff's ability to engage in these activities was limited because of her symptoms. For
 17 example, plaintiff often cooked simple or pre-prepared meals that required minimum
 18 effort (AR 254, 296, 490, 495, 1229) and made crafts for five to seven hours a week
 19 (AR 977) or two hours a day (AR 1475) while her husband prepared the shipments (AR
 20 978).

21 The ALJ also mischaracterized much of the evidence regarding plaintiff's
 22 inconsistent statements. For example, the ALJ found that plaintiff handled most
 23 household responsibilities, and cited treatment notes where she stated she felt
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1 “responsible for everything and anything.” AR 541. But plaintiff made this statement to
 2 describe how her fibromyalgia symptoms affected her marriage while seeking treatment
 3 for depression. *Id.* The ALJ also pointed out that plaintiff testified in the 2017 hearing
 4 that she could not drive while the records show that she does drive. AR 947. But plaintiff
 5 clarified in the 2017 hearing that she had not “100% stopped driving” (AR 53) and has
 6 consistently explained in other parts of the record that she would do so if needed (AR
 7 255, 297). Finally, the ALJ stated that plaintiff reported she had no hobbies even though
 8 the records show that she would read and make crafts. AR 947. Yet the ALJ
 9 misapprehended the cited evidence—plaintiff did not assert she had no hobbies, only
 10 that she did not partake in them often; the record supports her assertion. AR 256, 298,
 11 1231. The ALJ’s finding that plaintiff’s activities were inconsistent with her own
 12 statements is unsupported by substantial evidence.

13 Regarding the ALJ’s second reason, as previously discussed, Social Security
 14 Administration regulations recommend looking at longitudinal records because the
 15 symptoms of fibromyalgia “wax and wane,” and a person may have “bad days and good
 16 days.” SSR 12-2p at *6. See also *Revels*, 874 F.3d at 663. Here, the treatment notes
 17 cited by the ALJ showed that plaintiff had some improvements with respect to sleep
 18 disturbance (AR 527, 544) or mood management (AR 825), but much of the evidence
 19 also continuously shows that plaintiff suffered decreased memory and concentration
 20 (AR 527, 541, 825, 919).

21 With regards to the ALJ’s third reason, an ALJ may consider inconsistent
 22 statements when evaluating the reliability of a claimant’s testimony as a whole. *Fair v.*
 23 *Bowen*, 885 F.2d 597, 604 n.4 (9th Cir. 1989). “A single discrepancy fails, however, to

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1 justify the wholesale dismissal of a claimant's testimony." *Popa v. Berryhill*, 872 F.3d
2 901, 906-07 (9th Cir. 2017). Here, the ALJ found an inconsistency between plaintiff's
3 testimony and the record regarding her alcohol abuse. AR 948. During the hearing,
4 plaintiff testified that she had stopped drinking alcohol four or five years ago (AR 980-
5 81), but the records show that plaintiff consumed alcohol during this time (AR 914, 830,
6 845,1507-08) and that it was one of the causes for her termination from her job (AR
7 237).

8 While the ALJ correctly observed that there was a discrepancy between plaintiff's
9 statements and the record, the discrepancy is one that that does not "justify the
10 wholesale dismissal of a claimant's," especially since the ALJ's other reasons for
11 discrediting plaintiff's testimony were not supported by substantial evidence. See *Popa*,
12 466 F.3d at 883-84.

13 C. Whether the ALJ Properly Evaluated Lay Witness Evidence

14 When evaluating opinions from non-acceptable medical sources such as a
15 therapist or a family member, an ALJ may expressly disregard such lay testimony if
16 the ALJ provides "reasons germane to each witness for doing so." *Turner v. Comm'r of*
17 *Soc. Sec.*, 613 F.3d 1217, 1224 (9th Cir. 2010).

18 In a letter to Social Security Administration, plaintiff's husband wrote that plaintiff
19 was terminated from her job due to her ongoing symptoms. AR 327. He also stated that
20 she has significant difficulties completing her activities of daily living due to pain, fatigue,
21 and decreased memory and concentration. AR 325-27.

22 The ALJ rejected his testimony, finding that it was inconsistent with (1) the
23 medical evidence showing plaintiff had improved on medication, (2) the record
24 regarding plaintiff's termination from her job and alcohol use, and (3) plaintiff's daily

1 activities.

2 The ALJ's reasons for rejecting the testimony of plaintiff's husband were
 3 substantially the same as those given for rejecting plaintiff's symptom testimony. As
 4 discussed above, *supra* Section IV.B., these reasons were not supported by substantial
 5 evidence. In rejecting the lay witness statements by relying on an incomplete discussion
 6 of the medical evidence, the ALJ erred by failing to give reasons germane to each
 7 witness for doing so.

8 **D. Harmless Error**

9 An error is harmless only if it is not prejudicial to the claimant or "inconsequential"
 10 to the ALJ's "ultimate nondisability determination." *Stout v. Comm'r Soc. Sec. Admin.*,
 11 454 F.3d 1050, 1055 (9th Cir. 2006).

12 In this case, the ALJ's errors were not harmless because a proper evaluation of
 13 the medical opinions of Dr. Byus, Dr. Davenport, and Dr. Wingate and the testimony of
 14 plaintiff and her husband could change the ALJ's assessment of Plaintiff's RFC and
 15 may affect the hypotheticals provided to the VE.

16 **E. Whether the ALJ's RFC Determination Was Supported by Substantial**
Evidence

17 The ALJ committed harmful error, necessitating the ALJ's reassessment of the
 18 medical opinions of Dr. Byus, Dr. Davenport, and Dr. Wingate regarding plaintiff's
 19 limitations and the testimonies of plaintiff and her husband on remand. See Sections
 20 IV.A.3.–C., *supra*. Therefore, the ALJ must reassess the RFC on remand. See Social
 21 Security Ruling 96-8p, 1996 WL 374184 (1996) (an RFC "must always consider and
 22 address medical source opinions"); *Valentine v. Comm'r Soc. Sec. Admin.*, 574 F.3d
 23
 24

1 685, 690 (9th Cir. 2009) ("an RFC that fails to take into account a claimant's limitations
 2 is defective").

3 Because the ALJ must reassess the evidence, and a new set of hypothetical
 4 questions may be asked of the vocational expert during a new hearing, the ALJ is
 5 directed to re-evaluate Step Five to determine whether there are jobs existing in
 6 significant numbers in the national economy Plaintiff can perform given any changes to
 7 the hypothetical questions, and the RFC.

8 F. Remand With Instructions for Further Proceedings

9 "The decision whether to remand a case for additional evidence, or simply to
 10 award benefits[,] is within the discretion of the court." *Trevizo v. Berryhill*, 871 F.3d 664,
 11 682 (9th Cir. 2017) (quoting *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987)). If
 12 an ALJ makes an error and the record is uncertain and ambiguous, the court should
 13 remand to the agency for further proceedings. *Leon v. Berryhill*, 880 F.3d 1041, 1045
 14 (9th Cir. 2017). Likewise, if the court concludes that additional proceedings can remedy
 15 the ALJ's errors, it should remand the case for further consideration. *Revels*, 874 F.3d
 16 at 668.

17 The Ninth Circuit has developed a three-step analysis for determining when to
 18 remand for a direct award of benefits. Such remand is generally proper only where

19 "(1) the record has been fully developed and further administrative
 20 proceedings would serve no useful purpose; (2) the ALJ has failed to
 21 provide legally sufficient reasons for rejecting evidence, whether claimant
 22 testimony or medical opinion; and (3) if the improperly discredited
 23 evidence were credited as true, the ALJ would be required to find the
 24 claimant disabled on remand."

25 *Trevizo*, 871 F.3d at 682-83 (quoting *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir.
 26 2014)).

The Ninth Circuit emphasized in *Leon v. Berryhill* that even when each element is satisfied, the district court still has discretion to remand for further proceedings or for award of benefits. 80 F.3d 1041, 1045 (9th Cir. 2017).

As discussed above, the ALJ harmfully erred in evaluating the medical opinion evidence of Dr. Byus, Dr. Davenport, and Dr. Wingate and the testimonies of plaintiff and her husband. On remand, the ALJ is directed to re-evaluate the opinions of Dr. Davenport and allow plaintiff to provide additional testimony and evidence, as necessary to clarify the record.

CONCLUSION

Based on the foregoing discussion, the Court finds the ALJ erred when he determined plaintiff to be not disabled. Defendant's decision to deny benefits therefore REVERSED and this matter is REMANDED for further administrative proceedings.

Dated this 15th day of February, 2022.

Theresa L. Fricke

Theresa L. Fricke
United States Magistrate Judge